Postal Regulatory Commission
Submitted 2/3/2020 7:38:23 AM
Filing ID: 112149
Accepted 2/3/2020

Before the
POSTAL REGULATORY COMMISSION
Washington, DC 20268-0001

Statutory Review of the System for Regulating Rates and Classes for Market Dominant Products	:	Docket No. RM2017-3

INITIAL COMMENTS OF THE GREETING CARD ASSOCIATION IN RESPONSE TO ORDER NO.5337

The Greeting Card Association (GCA) files these comments pursuant to Order No. 5337 (December 5, 2019). GCA, which comprises more than 200 greeting card publishers and other enterprises, is the postal trade association which speaks for the individual household mail user. The present Comments discuss an issue we consider especially important for users of all market-dominant products.

I. THE COMMISSION SHOULD NOT EXCLUDE ISSUES ARISING UNDER THE OBJECTIVES AND FACTORS OF 39 U.S.C. SEC. 3622(b) AND (c)

In GCA's view, a seriously troubling aspect of Order 5337 is the proposal to eliminate from price-cap rate adjustment cases of any consideration of issues arising under the objectives (sec. 3622(b))[1] or the factors (sec. 3622(c)) of the Postal Accountability and Enhancement Act of 2006. Proposed 39 CFR secs. 3010.121 and 3010.126, and the Commission's discussion at pp. 239-240 of Order 5337, make it clear that this would be the effect of the proposed rules. GCA urges the Commission to abandon this proposal and instead – if necessary – propose usable ground rules for the discussion and decision of such issues in price-cap cases.

A. The *Carlson* decision cannot be put aside, as Order 5337 appears to do

[1] In this document, statutory section citations standing alone refer to title 39, U.S.C.

The Carlson opinion. Preliminarily, we must address the effect on this issue of the decision in *Carlson* v. *Postal Regulatory Commission,* 938 F.3d 337 (D.C. Cir., 2019). Order 5337 states that *Carlson* "did not rest on the premise that the PAEA unambiguously required the Commission to apply the objectives and factors in rate adjustments[.]"[2] It may be that the panel did not state, in so many words, that this proposition was the basis of its opinion. But read as a whole, the opinion does interpret the statute as requiring just that.

The Court held that the Commission must consider the objectives and factors in a rate adjustment and may not postpone consideration to an annual compliance review or complaint; it stated that this conclusion was "[b]ased on the text and structure of the PAEA."[3] If PAEA precludes postponement of these issues to post-implementation proceedings, they clearly must be considered (as the Court held) in the rate adjustment itself; otherwise they would be effectively read out of the statute. The panel rejected the Commission's argument based on legislative history, stating that when a statutory text is clear, legislative history cannot be used to obscure it. To say that legislative history cannot be used in this situation is logically (and practically) equivalent to stating that the statute *is* clear. And in accepting Carlson's argument that a single rate cannot create the simplicity of structure demanded by factor (c)(6), the panel referred to the statute's "plain terms."

All of this, in GCA's view, means that the Court did find the statute unambiguous in requiring consideration of the objectives and factors in a price-cap docket.

This conclusion is not overcome by the Court's agreement that Congress granted the Commission discretion in creating the "modern system" of regulation called for by sec. 3622(a). Discretion is not unlimited when it is granted to an agency by the statute which sets it up and directs it to carry out a defined task – which under sec.3622(a) is the Commission's situation. Legislatively granted discretion is not available to undercut

[2] Order 5337, p. 240, fn.328.

[3] 938 F.3d 337, 343.

one of the purposes of the statute establishing the agency. Since the object of establishing a modern system of regulation, expressed in sec. 3622(a), was to effectuate the objectives while considering the factors, the discretion Congress gave the Commission was to be directed toward that goal.

The Commission mentions, in the footnote just cited, that the Court did not discuss the authority granted by sec. 3622(d)(3). That is true. Since Docket R2019-1, and *Carlson* itself, were decided under the existing regulatory system, it is not clear what a discussion of the Commission's authority to change it would have added to the decision. That apart, however, sec. 3622(d)(3) calls upon the Commission to find whether the existing system is achieving the objectives, considering the factors; and if it is not, to design modifications or an alternative which will achieve the objectives. Designing a system in which those issues are excluded *ex ante* from all price-cap cases is not a way to achieve them. This is all the more true when, as we explain below, the exclusion is neither necessary nor good policy.

B. <u>Excluding the objectives and factors is unreasonable in light of the extension of the rate adjustment schedule</u>

In the *Carlson* case, the Commission argued that a 45-day rate adjustment case schedule made it impractical to consider the objectives and factors concurrently, and required them to be postponed to annual compliance review or complaint cases. The Court rejected this argument. It held – consistently with its view that the objectives and factors must be considered – that the Commission was not in fact limited to 45 days. See the *Carlson* opinion, section II.C.

In proposed section 3010.121(c), (d) the Commission effectively moots the question of whether the statute absolutely limits rate-adjustment cases to 45 days. The extension of the schedule to 90 days – which GCA fully supports – means that consideration of the objectives and factors is not infeasible. It will become even more practicable if the Commission finally adopts its proposed sec. 3010.286 – which GCA also supports

– since that will relocate any disputes[4] over justification for keeping a noncompliant workshare discount to a pre-rate-adjustment timeframe.

C. *Carlson* apart, excluding the objectives and factors is bad policy

While *Carlson* held that postponement of issues arising under the objectives and factors was not justified, we need not rely on the Court for that proposition. The exclusion of such issues from rate adjustment dockets is itself bad policy in light of the purposes of the governing statute.

One of the objectives ((b)(8)) requires establishment and maintenance of a just and reasonable schedule of rates. Section 3681 forbids reimbursement of mailers for a rate subsequently found unlawful. Requiring mailers to pay an unlawful rate for an extended period subverts objective (b)(8): the rate schedule incorporating that rate is not a just and reasonable one.

Take, as an example, the best possible hypothetical case. The day after the Commission issues its order in the rate adjustment case, a mailer files a complaint against a rate it considers unlawful. The statute (sec. 3662(b)(1)) gives the Commission 90 days to decide whether to entertain the complaint. If all this time is used, and the Commission schedules proceedings on the complaint, they may reasonably be expected to consume another 90 days. Thus before the Commission even ordered relief, the mailer would be subject to the unlawful rate – irrevocably – for half a year.

In the absence of a complaint, the first opportunity to correct the unlawful rate would be the next annual compliance review. The Postal Service files its compliance materials near the end of the calendar year, and the Commission commonly issues its determination in late March. The unlawful rate would then be imposed without possibility of recoupment for an even longer time.

All this, by itself, would be more than sufficient reason to retract the proposal to eliminate consideration of the objectives and factors in rate adjustment cases. In the context of Order 5337 generally, however, it becomes even more deleterious. With the

[4] As the list of required factual showings in proposed sec. 3010.286(c) makes clear, such disputes would likely be complicated.

Postal Service potentially entitled to rate increases substantially exceeding inflation, mailers' inability to challenge an unlawful rate at the outset would entail an even more damaging raid on their resources while a complaint was in process.

Order 5337 does not acknowledge that by refusing to consider issues under the objectives and factors in a rate adjustment docket, where the Postal Service is the moving party, the Commission is shifting the burden of proof to the affected mailer. The *Carlson* panel quite correctly considered this fact significant, and the Commission should do the same.

Relatedly, proposed sec. 3010.121(b) relieves the Postal Service of any obligation to show why its proposed rates are lawful.[5] It calls on the Service to "take into consideration" how the rates are consistent with ch. 36, but no longer requires it to report on such consideration. In other words: the Postal Service may propose rates without explaining why it thinks they are lawful, and the Commission may approve them without knowing the Service's reasoning or the facts on which it may have relied. This situation may be consistent with a process which considers nothing but cap compliance (which the Postal Service would have to explain) but it also leaves a potential complainant in the dark about what arguments or showings it would have to controvert.

Summarizing:

- The *Carlson* decision, correctly interpreted, does mean that PAEA requires consideration of the objectives and factors in a price-cap rate adjustment case.

- By extending the rate adjustment schedule to 90 days, the Commission has effectively abandoned its previous justification for postponing such issues to complaint or annual compliance review proceedings.

[5] Existing sec. 3010.12(b)(7) does require such an explanation. Order 5337, p. 245, shows that the omission is deliberate.

- Because sec. 3681 forbids recoupment of unlawful rates by the affected mailer, the proposed rules would unfairly and deleteriously require such mailers to pay unjustified rates for at least half a year, and perhaps longer.

- Postponing decision on issues under the objectives and factors to post-implementation review would unjustifiably shift the burden of proof to the mailer; the Postal Service would be relieved of *any* obligation to justify them under the substantive requirements of PAEA until it faces a complaint or a challenge in an ACR docket – which would have to be filed in ignorance of why the Postal Service originally considered the rates lawful.

February 3, 2020

Respectfully submitted,

GREETING CARD ASSOCIATION

David F. Stover
2970 S. Columbus St., No. B1
Arlington, VA 22206-1450
(703) 998-2568 or (703) 395-1765
E-mail: postamp02@gmail.com